FILE COPY

NO. 357

# In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
*Appellant,*

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA
*Appellee.*

## SUPPLEMENTAL BRIEF OF THE APPELLEE

ERNEST F. JENKINS,
GUY L. HORTON,
*Counsel for the Appellee.*

NO. 357

# In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
*Appellant,*

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA
*Appellee.*

## SUPPLEMENTAL BRIEF OF THE APPELLEE

### ARGUMENT

Appellant in this case claims that the oil in question is exempt from a state ad valorem taxation, on the theory that to tax such oil would be taxation of a governmental instrumentality.

Several cases are cited to sustain such contention, two of which are given considerable emphasis, the cases of *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, and *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609.

The above cases are not in point in fact with the case at bar, but are considered analagous by the appellant. If either are analagous, we consider the Gillespie case more so. Therein it was held that the lessee's income derived from the sale of his share of the oil and gas from a lease on restricted Indian land, was exempt on the theory that to tax the same would constitute taxation of a government instrumentality. In the present case, it is sought to tax the lessee's share of the oil produced on a restricted Indian lease, the Indian given his share, and that belonging to the appellant being removed more than a hundred miles away, mixed and stored with other and similar oil. We think it is important to mark the physical segregation, the fact that the oil was so moved, mixed and stored, before being assessed for ad valorem taxation.

We believe to apply the doctrine of the Gillespie case to the present case would be to further enlarge the same, and it has been said by this court in the case of *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, in an opinion by Mr. Justice McReynolds:

> "We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analagous to those which it disclosed."

In the same case Mr. Justice Stone wrote a dissenting opinion, concurred in by three other members of the court in which he said he believed the Gillespie case should be overruled.

In the Case of Group No. 1 *Corporation* v. *Bass*, 283 U. S. 279, a later case than the Gillespie case, supra, the facts were as follows: The appellant oil company owned leases obtained from the State of Texas on land belonging to the public do-

main, set aside for the support of the university. The law of Texas regarding oil leases is that such a lease upon execution amounts to a present sale of the oil and gas in place. Oil was produced from the lease, and income taxes were sought to be collected from the income therefrom by the Federal government. This court held that such income was subject to taxation, and such taxation did not amount to the taxation of a governmental instrumentality, on the theory that as the state law considered the execution of the oil lease as a sale of the oil in place, the tax was on income from the private property of the appellant.

We see little distinction between that case and the case at bar. It is true that the same construction on the status of the ownership of the oil after execution of the lease does not exist in Oklahoma as in Texas, but the same principle applied in that case will apply in the case at bar. In Oklahoma the rule as stated in *Kolachy* v. *Galbreath*, Oklahoma Reports, 110 Pac. 902, is:

> "Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas is not therefore, a grant of the oil that is in the ground, but such a part as may be found by the grantee."

In Texas the lessee is the theoretical owner of all the oil beneath the land covered by the lease. In Oklahoma, he is the actual owner of all he can get to the surface. It becomes the lessee's personal property when he reduces it to his possession. If to tax the oil, or the income from such oil, produced under the Texas lease, would not amount to the taxation of a gov-

ernmental instrumentality, in logic how could such be the case in Oklahoma? Under both leases a royalty must be paid, and a purchase price for the lease. In Oklahoma, most certainly, where the lessee takes the oil, segregates its share from the Indian's, moves it one hundred twenty miles away, mixes it with its other oil, it becomes their personality, subject to ad valorem taxation, and becomes exactly analagous to the Texas case.

The case of *Jaybird Mining Company* v. *Weir,* 271 U. S. 609, 70 L. Ed. 1112, 46 S. C. R. 592, is a case originating in this State and involves an entirely different state of facts than exists here. In the Jaybird Mining Company case, supra, the ore sought to be taxed was mined from land owned by a restricted Indian, and at the time it was attempted to be assessed for taxation, such ore was in the bins at the mine and on the property where it was produced in mass. The Supreme Court of the United States does not attempt to say that the lessees share thereof is exempt from taxation, but does say (Syllabus 3):

"Where the interests have not been segregated" and "Where produced and in bins on the land on January 1, 1921" (Body of opinion) it was exempt from taxation." Such does not enlarge the doctrine in the Gillespie case, supra.

If we should follow the theory and contention of the Company to its logical conclusion, and hold that this oil was exempt from taxation so long as it was in the possession of the Company which produced it from the land of restricted Indians, then, and in that event, if they should refine the oil into various by-products: gasoline, grease, kerosene, etc., it

would be exempt from taxation so long as it remained in the possession of the Company. This theory is untenable, not supported by law, and contrary to any principles of natural justice and equality in matters of taxation.

The most that we can make out of the decision in the Jaybird Mining Company case, supre, is that the oil produced on this lease by the lessee while acting as a government instrumentality would be exempt from taxation while stored in flow-tanks upon the lease, and before the interests of the lessor had been disposed of, or segregated from the mass.

Referring to the Group No. 1 Oil Corporation v. Bass case, supra, it was said:

> "Property which has thus passed (speaking of theoretical sale of oil in place under Texas lease) from either the state or national government to private ownership becomes a part of the common mass of property and subject to its common burdens * * * (Speaking of Indian Lease cases) but no case has extended such immunity to property, real or personal, or income derived from its sale where it has passed to the buyer by a completely executed act of sale, without restriction, and no interest has been retained for the benefit of the Indian.

While there was no sale in this case, the appellant in the end, as in the above case, secured possession of the oil. Here it segregated its interest and took it away from the lease and commingled it with other of its oil, where the Indian had no interest left. How would taxing the same impede the governmental instrumentality? Must the State segregate it again so it can tax that produced from other sources?

Quoting from a note at the bottom of the page 595, 46 S. C. R., in the case of *Jaybird Mining Co.* v. *Weir:*

> "It is therefore manifest that exemption of federal agencies from State taxation is dependent not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they were agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform."

Quoting from Justice Kornegay's opinion in the Oklahoma Court:

> "When one analyzes the cases that are relied upon in the *Jaybird Mining Company* v. *Weir* case for the exemption thereof, he will find that they all go back to the original case of *Choctaw, Oklahoma & Gulf Ry. Co.* v. *Harrison* 235 U. S. 292 59 L. ed 234." The opinion says:
>
> > "The lessee is an agency or instrumentality employed by the government for the development and use of the restricted land, and to mine ores therefrom, for the benefit of its ward."
>
> "And the case of *Choctaw, Oklahoma & Gulf Ry. Co.* v. *Harrison,* cited above, is cited and relied on. In the Harrison case, it was held that the tax complained of was an occupational tax which entirely distinguishes said case from the Jaybird Mining Company case, and from the case now before the bar of this Court. With that as a basis, most of the decisions since have been pronounced, and the Jaybird Mining Company case is an extension of that idea beyond its normal expanse, as it would seem from the dissenting opinions filed therein.
>
> On the whole, these cases seem to be based largely upon the idea of a governmental agency helping one class of Indians protect themselves as against the greed of their fellows, as distinguished from the idea of interfering with a property tax upon that which has been derived from such property and its ownership transferred to a corporation, and has become a part of the mass of property of the citizens of the State. However, the idea of govern-

mental agency, as applied to the oil in this case, can well be extended both forward and backward. If extended backward, when the government, with like duties owing to its Indian wards, allowed certain classes to make their own contracts, without supervision of the government, and allowed the share of the Indian land owner and the share of the product belonging to the operator, produced as a result of labor in extraction, each to be subject to state tax, while the operators' share, working on restricted land, is exempt, equality in burden bearing no longer exists. The operator on the restricted land has the advantage. The enabling act requires, that the State Constitution shall "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

We think the taxation of the oil in this case consists merely of the taxation of the property of the appellant. The tax will in no way impede the operation of the lease from which the oil was originally secured. The influence is too remote. *Central P. R. Co.* v. *California*, 162, U. S. 91. The tax is the same charged all competitors of the appellant and the appellant itself on oil produced from all other sources. It is a tax upon the property of the appellant, reduced to its possession, and not upon the operation of the lease or instrumentality of the government.

If the appellant wins its contention in this case as Justice Kornegay has pointed out in the lower court, it could erect a refinery in which nothing was used but oil from restricted Indian lands, and dispose of the gasoline so produced, tax free.

There is no reason why the Indian Territory Illuminating Oil Company should not pay its taxes upon this oil as it enjoys the protection of the State government. There is neither de-

fined exemption by positive law, nor undefined exemption from rules of policy, and it would be unfair to other competitors in the production of oil in the State of Oklahoma to say that this corporation, the appellant herein, is exempt from taxation just because the oil that they had in tanks in Payne County on January 1, 1928, had, sometime prior to that time, been taken from restricted Indian land under a lease approved by the Secretary of the Interior.

Respectfully submitted,

ERNEST F. JENKINS,
GUY L. HORTON,
*Counsel for the Appellee.*